STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of MARTI ELAINE DAVIS, KAYLEE M. DAVIS, and CHRISTIAN L. DAVIS, Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

MARTIN OSCAR DAVIS,

Respondent-Appellant.

UNPUBLISHED
February 16, 2006

No. 263745
Ogemaw Circuit Court
Family Division
LC No. 04-012717-NA

In the Matter of MARTI ELAINE DAVIS, KAYLEE M. DAVIS, and CHRISTIAN L. DAVIS, Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

V

KIMBERLY LOUISE DAVIS,

Respondent-Appellant.

No. 263756
Ogemaw Circuit Court
Family Division
LC No. 04-012717-NA

Before: Wilder, P.J., and Zahra and Davis, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the minor children under MCL 712A.19b(3)(b)(ii), (b)(iii), (g), and (j), and pursuant to the Indian Child Welfare Act, 25 USC 1912. We affirm.

These child protective proceedings were initiated when the two older children disclosed being raped after respondent mother left them at a carnival bunkhouse. The two older children were already placed out of the home at the time of their disclosure pursuant to delinquency proceedings for truancy. Respondent father was incarcerated at the time of the carnival incident and remained incarcerated throughout these proceedings.

The trial court did not clearly err by terminating the parental rights of respondents. In order to terminate parental rights to an Indian child, it must be shown beyond a reasonable doubt, by evidence including the testimony of qualified expert witnesses, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child. 25 USC 1912(f). A statutory ground for termination under state law must also be established, by clear and convincing evidence. *In re SD*, 236 Mich App 240, 246; 599 NW2d 772 (1999). A decision terminating parental rights is reviewed for clear error. *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999).

After reviewing the record, we can only conclude that the evidence is amply sufficient to show beyond a reasonable doubt that the children are likely to suffer serious physical and emotional damage in the care of respondents, 25 USC 1912(f), by virtue of both respondents' physical abuse of the children and their inability to protect the children from sexual predators. Tribal expert Robyn Hill testified that returning the children to the custody of their parents was likely to result in physical and emotional damage to them, and opined that the unstable parenting and the sexual abuse of the children warranted the termination of respondent's parental rights. The evidence indicated a pattern on the part of both respondents of failing to protect the children, who each testified that they were repeatedly sexually victimized by various offenders. Respondent mother testified that she did not believe the allegations made against the minor children's teenage cousin, and that she would continue to have contact with the cousin. Both respondents denied that Christian told them that Russell had sex with her, and they did not believe that it had happened. Respondent father initially indicated that, although he believed that the two older children had been raped when they were left at a carnival bunkhouse by respondent mother, he could not be judgmental about respondent mother's conduct at that time. Only on further questioning did he indicate that he felt something was wrong with her judgment on that occasion. Respondent father indicated that he planned to live with his mother upon his release from prison but did not know whether his brother and sister-in-law, whose parental rights to children were terminated in a case involving sexual abuse and who lived in the home at the outset of this case, still lived in that home. The trial court did not err in finding beyond a reasonable doubt that neither respondent mother nor father possessed the ability to protect the children in the future, and that the children will be subject to physical and emotional harm if returned to their parents.

The trial court also did not clearly err by finding at least one statutory ground for termination under state law was established by clear and convincing evidence with respect to each respondent. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). It is clear from the evidence that respondent mother failed to prevent the sexual abuse of the children when she had the opportunity to do so, and that respondent father would be completely incapable of protecting them in the future.

The evidence also amply established that both respondents failed to provide proper care and custody for the minor children, would be unlikely to be able to do so within a reasonable

time, and that the children would likely be harmed if returned to respondents' care. Not only did the evidence show that respondents failed to protect the children from sexual predators and would be unlikely to protect them in the future, the evidence also established that respondents inflicted physical abuse upon the children. In addition, the evidence showed that respondents failed to attend to the children's medical needs, resulting in the surgical removal of teeth for all three of the children. Respondent mother also failed to ensure school attendance by Christian and Kaylee, resulting in delinquency proceedings for the children and contempt proceedings for respondent mother. Finally, this record supplies no evidence suggesting that termination is clearly contrary to the best interests of the children. MCL 712A.19b(5).

Respondent father also argues that reversal is required because "active efforts" were not made to prevent the breakup of an Indian family as required by 25 USC 1912(d). The evidence must demonstrate beyond a reasonable doubt that such active efforts were made but failed. *In re Kreft,*148 Mich App 682, 693; 384 NW2d 843 (1986); *In re Morgan*, 140 Mich App 594, 603-604; 364 NW2d 754 (1985). The evidence in this case was sufficient to show beyond a reasonable doubt that active efforts were made to provide remedial and rehabilitative services designed to prevent the breakup of an Indian family. The family received over five years of community services, including but not limited to Child Protective Services case management, public assistance, WIC, probation, Work First, Food Stamps, Medicaid, gas monies, assistance from the District Health Department, and psychological evaluations. These services did not significantly impact respondents' lifestyle. Several of the services were offered more than once, without any demonstration of benefit.

Respondent father was incarcerated in February 2004 and remained incarcerated throughout these proceedings. He was not offered services through the agency while incarcerated, but he nevertheless received rehabilitative services during that time. He participated in a critical thinking seminar while incarcerated, which according to his testimony helped him to deal with his anger and his own past victimization. He further testified that he completed a twelve step program in prison and attended NA once a week. However, these rehabilitative services have not altered respondent father's outlook concerning his children, as he denied their allegations of physical abuse, did not believe that Russell sexually abused Christian, and testified that he did not know whether her cousin had sexually abused her. Equally concerning was the fact that respondent father could not unequivocally fault respondent mother's judgment in leaving the children with strangers overnight in a carnival bunkhouse, even though he believed that the children were raped on that occasion. Finally, attempts to prevent the breakup of the family were made via services for respondent mother during the instant proceedings. Respondent mother was offered assistance in finding employment and housing and was offered visits with the children, all clearly designed to prevent the breakup of the family. However, in the two months of services, she did not obtain employment, did not submit housing for inspection, and visited the children only four out of eight possible times. The evidence was sufficient to show beyond a reasonable doubt that active efforts were made to prevent the breakup of the Indian family.

Respondent mother also contends on appeal that petitioner violated public policy by inducing her to plead to allegations of the initial and first supplemental petitions by promising not to seek termination at the initial disposition, and then filing a petition for termination only two months after respondent mother's plea and only one month after the initial disposition

relating to her. This issue is not preserved for appeal because respondent mother did not seek to withdraw her plea in the trial court. See, e.g., *In re Zelzack*, 180 Mich App 117, 122-123; 446 NW2d 588 (1989); *In re Campbell*, 170 Mich App 243, 249-250; 428 NW2d 347 (1988). In any event, we conclude that the actions of petitioner with respect to respondent mother did not violate public policy. Facts disclosed after respondent mother's plea and the initial petition amply warranted a change in the plan from reunification to termination, and moreover constituted circumstances new or different from those leading to adjudication so as to permit the early filing of a termination petition. MCR 3.977(F). The conditions of adjudication relating to respondent mother were medical neglect, educational neglect, and the single instance of leaving the children in a carnival bunkhouse. The subsequent disclosures related serious physical abuse, emotional abuse, and a pattern of failing to protect the children from sexual abuse. The court rules permit a petitioner to seek termination at any time based on new or different circumstances than those that led to the taking of jurisdiction. We discern no bad faith in petitioner's actions with respect to respondent mother.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis